BDO IRELAND

CHANGES TO IRELAND'S TRANSFER PRICING REGIME

Finance Bill 2019

BDO

REFLECTING NEW INTERNATIONAL STANDARDS

Ireland's transfer pricing regime will significantly change from **1 January 2020**—nine years after its introduction. The government has signaled several areas for potential change, though the details of actual change will only be clear when **Finance Bill 2019** is published this November.

The Irish government will broadly update transfer pricing laws to reflect new international standards set by the OECD. However, the government is likely to make further legislative changes in order to address concerns regarding perceived tax avoidance by international corporations.

Listed below are five aspects of Ireland's transfer pricing rules subject to reform this year. This article conveys our informed view on the likelihood of changes the government will enact this year.

1. Adopt 2017 OECD Transfer Pricing Guidelines to set arm's length prices.
2. Introduce documentation standards in-line with OECD Master and Local file framework.
3. Remove the grandfathering exemption for arrangements in place before 1 July 2010.
4. Remove exemption for small and medium-sized enterprises (SMEs).
5. Extend transfer pricing rules to non-trading and capital transactions.

BACKGROUND

Following the conclusion of the OECD BEPS Project in 2015, the Irish government commenced a review of its corporate tax code with the assistance of an independent expert. The expert's review concluded in 2017 where he advised on a range of reform to corporate tax policy including transfer pricing. In February 2019, the government initiated a consultation on Irish transfer pricing rules, covering the five above aspects. While the consultation closed in April, government officials continue to consult with stakeholders to take advice. Our views in this article are based on this consultation.

GUARANTEED

2017 OECD GUIDELINES AND DOCUMENTATION STANDARDS

1. Ireland's current transfer pricing regime cites the 2010 OECD Guidelines as basis for determining the arm's length price. In practice, most Irish businesses today are establishing transfer pricing policy adhering to the most recent 2017 version of the OECD Guidelines. By adopting the 2017 OECD Guidelines into Irish transfer pricing legislation, the government is reflecting accepted international practice into our domestic law.

2. In contrast, the introduction of OECD-standard documentation obligations will be substantial for many businesses, as no formal requirement exist in Ireland today. Ireland previously adopted the OECD BEPS initiative to mandate Country-by-Country Reporting for only the very large international businesses. Ireland will shortly require businesses to prepare OECD-standard Master and Local files to show their compliance. It remains to be seen whether the government will reduce the documentation burden for businesses of moderate size and scale. We expect SMEs will be exempt from having to prepare the full OECD documentation standard, consistent with most countries.

NEARLY CERTAIN

REMOVING GRANDFATHERING EXEMPTION

3. When transfer pricing rules took effect in 2011 they exempted arrangements that were entered into prior to 1 July 2010 and remained unchanged since. The purpose was to ease the compliance burden for all Irish business. It was the government's intent that such exemptions were temporary and after several years no arrangement would be exempt. There has been considerable debate amongst stakeholders as to whether businesses can claim exemption for ongoing arrangements. Hence, it has been long-anticipated the government will remove the grandfathering exemption.

QUESTIONABLE

EXTENSION TO SMEs

4. Ireland adopted common European principles to reduce compliance burdens on SMEs, in that smaller Irish businesses were exempt from having to comply with prescribed transfer pricing rules. Ireland's tax regime contains numerous anti-abuse rules that otherwise restrict aggressive tax planning by all corporations and thus covers SMEs.

In developing new tax policy, the Irish government considers whether the increased burden on business arising from new tax legislation is proportionate with the tax avoidance new legislation aims to eliminate. The Irish government indicated it takes such consideration into account in developing tax policy for the SME sector.

One view is that the Irish government will pursue higher priority tax legislation this year and defer changes to tax legislation affecting SMEs to a future year, thus preserving the SME transfer pricing exemption. On the other hand, the government may opt for legislative efficiency on transfer pricing matters and pass all changes using one set of legislation. Our conversations with officials indicates (but cannot confirm) that the government will preserve the SME transfer pricing exemption this year, and will re-evaluate wider tax policy matters for SMEs during 2020.

UNPREDICTABLE

EXTENSION TO NON-TRADING TRANSACTIONS

5. Ireland's transfer pricing rules only apply to income earned or expenses incurred related to a "trade". The trade of a company is its purpose to generate profit. This broadly means only Irish taxpayers engaged in active business operations must comply with transfer pricing rules. As a result, entities not considered "trading" or transactions not "trading" in nature are exempt from transfer pricing rules in Ireland.

It is important to recognise the Irish government faces public pressure to address a form of non-trading transaction, namely Interest-Free Loans (IFL) granted by Irish companies to non-Irish affiliates. Such legally valid arrangements have been reported by the media as a mechanism used by corporations to artificially reduce worldwide tax liabilities; not to reduce their Irish taxes. In recent years, the government has willingly responded to international attention with measures addressing issues of public concern. Extending transfer pricing rules to cover non-trading transactions will minimise tax benefits from such IFL arrangements, while also capturing other arrangements not viewed as problematic. In this instance, it may prove challenging for the government to draft legislation that only targets a class of non-trading arrangements while fully exempting others. If public pressure continues, businesses should expect drastic changes to tax law in this area.

IS YOUR BUSINESS PREPARED FOR WHAT COMES NEXT?

Budget Day in Ireland is scheduled for October 8th, where the government announces new spending and taxation policies. Budget Day announcements headline forthcoming legislative changes to be published in subsequent weeks. The past year shows that the Irish government is willing to introduce laws with immediate effect upon announcement, thereby eliminating any potential for businesses to engage in tax planning between the announcement date and a later effective date.

Given the fundamental tax reforms already signalled by the government, many businesses operating in Ireland have been evaluating the likely impact from these changes to the transfer pricing regime.

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